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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 140

VILLAGE OF HAVERSTRAW,
Petitioner,

against

CLYDE POTTS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Point I. Under the provisions of subdivision 21 of section 89 of the Village Law, the filing of plaintiff's bills prior to the service of the summons was a condition precedent to the maintenance of the action; since concededly they were not filed until five years thereafter, the complaint should have been dismissed..... 9

Point II. Under section 128(a) of the Village Law, the contract of July 2nd, 1928 was illegal and void, as the Circuit Court of Appeals adjudicated on the first appeal; since to permit recovery for such services upon any theory would destroy the obvious purpose of the statute recovery therefor is denied by New York Law whether sought under the contract or upon *quantum meruit* 13

Point III. Assuming, arguendo, that after the approving vote of September 20, 1928, petitioner might lawfully have employed respondent to render certain services, the mere existence of such power, never exercised, could not validate, even in part, the illegal contract of

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July 2nd, 1928, nor support a recovery for services concededly rendered thereunder 18

Point IV. Since as the Circuit Court of Appeals held respondent had no contract implied in fact, and concededly he had no valid express contract, there was no basis for the ruling that respondent has a continuing contract which tolled the Statute of Limitations until respondent was discharged, there being at most only a contract implied in law, the Statute of Limitations ran from the time the services were rendered, barring any recovery 23

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

VILLAGE OF HAVERSTRAW, Petitioner, against CLYDE POTTS, Respondent.	}	No.

PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Village of Haverstraw, a municipal corporation duly organized and existing under the laws of the State of New York, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review the determination of that court affirming a judgment of the District Court for the Southern District of New York in favor of respondent against petitioner in the sum of $4,373.68.

The opinion of said court was filed on February 26th, 1940, is reported in 110 Fed. (2d) 58, and is printed as an appendix to the brief submitted herewith.

A transcript of the record, including the proceedings in the said Circuit Court of Appeals, is furnished herewith in accordance with rule 38 of this court.

Summary and Short Statement of the Matter Involved.

Nature of Suit and Decisions Below.

In 1928, petitioner's trustees were considering the installation of a municipal water supply system. They appointed a committee to employ an engineer to make a preliminary survey at a cost not to exceed $800. Negotiations between this committee and respondent resulted in a written contract dated July 2nd, 1928, which employed respondent, not preliminarily only, but for every phase of the work, on the basis of 7% of the cost of construction.

Respondent rendered some services and submitted a report. Following the report the trustees authorized the project subject to a referendum to the electors of the village. The proposition as submitted to the electors was whether the village should "establish a water works system costing not over $450,000", to be paid for by a 40 year bond issue.

On September 20th, 1928, the electors voted approval.

Thereupon, pursuant to the New York Conservation Law, a proceeding to procure the approval of the project by the State Water Power & Control Commission was initiated, and hung fire for nearly two years. The project was then formally abandoned by petitioner following a vote of the electors approving such abandonment.

Thereupon, on June 12th, 1931, respondent brought this action seeking damages for the breach of said written contract of July 2nd, 1928.

Upon this cause of action, he recovered a verdict of $17,000. Upon appeal, the Circuit Court of Appeals reversed the judgment on said verdict (79 Fed. (2d) 102; R. 96) holding that the complaint should have been dismissed because the contract of July 2nd, 1928 was invalid for violation of section 128-a of the Village Law (printed in full at p. 13, *post*), providing that no contract involving an expenditure

should be made unless the money therefor had first been appropriated.

However, the court suggested, although explicitly withholding decision thereon, that perhaps respondent might be entitled to recover on *quantum meruit* for certain of the services actually rendered, and granted him leave to apply to the District Court to amend his complaint accordingly.

Prior to so moving and in purported compliance with subdivision 21 of section 89 of the Village Law (printed at p. 9, *post*) respondent on April 15th, 1936, filed with petitioner two bills for his alleged services, demanding a total of $15,829.46.

Thereafter, on June 8th, 1936, plaintiff moved in the District Court for leave to amend his complaint to sue upon these two bills, which motion was granted by order dated August 22nd, 1936. The amended complaint was served on October 10th, 1936.

Upon petitioner's motion before answer, based upon various grounds, the District Court dismissed the amended complaint by order dated February 5th, 1937.

Upon respondent's appeal therefrom, the Circuit Court of Appeals (93 Fed. (2d) 506, R. 105) reversed the dismissal and remanded the case for further proceedings.

Thereafter, upon petitioner's answer to respondent's second amended complaint setting forth a single cause of action upon *quantum meruit* to recover said $15,829.46, the action again went to trial resulting in a verdict in favor of respondent of $3,500.

Upon petitioner's appeal from the judgment upon said verdict, the same was affirmed and petitioner seeks certiorari to review such affirmance.

In the court below, petitioner limited its appeal to three points thought to be decisive of the case (R. 41):

1. That subdivision 21 of section 89 of the Village Law had not been complied with since the bills upon which the

recovery was founded had been filed on April 1936, more than five years after the commencement of the action on June 12th, 1931.

2. That since the services sued for had admittedly been rendered pursuant to the illegal contract of July 2nd, 1928, no recovery could be had therefor even upon *quantum meruit*.

3. That all recovery was barred by the New York six year statute of limitations because no services had been rendered after June 8th, 1930, six years before the motion to amend the complaint made June 8th, 1936.

The Circuit Court of Appeals held with respect to

(1) that the filing of the bills more than 30 days before the amendment of the complaint sufficiently complied with the statute even though such filing was subsequent to the actual commencement of the action;

(2) that the vote of the electors of September 20th, 1928 authorized a recovery for the services rendered after that date; and

(3) that it could not say as matter of law that the statute of limitations had run.

Reason Relied Upon for Allowance of Writ.

We believe that the decision below upon important questions of local New York law is in direct conflict with New York decisions directly and distinctly applicable.

1. The decision below on the first of the above enumerated points is in direct conflict with *McGovern* v. *City of New York*, 160 Misc. 714, affd. 247 App. Div. 775, affd. 272 N. Y. 455.

2. The decision below on the second point is in direct conflict with a uniform line of New York decisions, e.g.: *Donoran* v. *The Mayor*, 33 N. Y. 291; *McDonald* v. *The Mayor*, 68 N. Y. 23; *Hart* v. *City of New York*, 201 N. Y. 45; *Wakefield* v. *Brophy*, 67 Misc. 298, affd. 144 N. Y. 905.

The two foregoing questions are questions of the greatest importance in the field of law involving municipalities.

1. It is almost universally true that before action may be brought against a municipality a bill or claim therefor must be formally submitted to the municipality. This is conceived to be essential to the orderly administration of a municipality's affairs. The decision below is, we believe, unprecedented. Since it is direct conflict with a New York decision squarely in point, it ought to be reviewed.

2. The second question is of even greater importance. The effort to prevent not only municipalities but most legislative bodies from spending money unless and until they provide the money therefor has been continuous and insistent for many years. Recognizing the sound public policy of such statutes, the courts have uniformly held that such laws will not be permitted to be circumvented by allowing recoveries on *quantum meruit* for services rendered under contracts illegal for violation of such statutes. The decision below runs counter to this continuous, well settled and sound rule of public policy. For this reason, as well as the fact that here again it is in direct conflict with New York decisions squarely in point, it ought to be reviewed.

3. The third point, while not of as great public importance as the first two, is, we think, of sufficient consequence to justify the attention of this court, particularly if the first two questions are reviewed.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Second Circuit commanding that court to certify and send to this court for hearing and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the case numbered 202, entitled Clyde Potts, appellee, against Village of Haverstraw, appellant, and that the said judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this honorable court and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just, and your petitioner will ever pray, etc.

Dated, June 7th, 1940.

VILLAGE OF HAVERSTRAW,
By MONROE J. CAHN,
WARNER PYNE,
Counsel for Petitioner.

We hereby certify that we have examined the foregoing petition, that in our opinion it is well founded, and the case is one in which the prayer of the petitioner for a writ of certiorari should be granted by this Court.

Dated, June 7th, 1940.

MONROE J. CAHN,
WARNER PYNE,
Counsel for Petitioner.